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RFRA AND THE POSSIBILITY OF JUSTICE

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I was skeptical when I first heard of the effort to overrule *Employment Division v. Smith* statutorily with the proposal of the Religious Freedom Restoration Act.[1] Why work so hard to restore a test that had never made all that much difference? I was eventually convinced by the arguments of litigators in this area that the compelling interest test made a difference at the administrative and trial level, where many religious exemption cases are decided, even if the test was largely ineffective in appellate litigation. The significant number of reported cases in the interval between *Smith* and RFRA which denied religious exemptions for relatively unimportant reasons suggests that the test had indeed created some space for religious exercise—space that was eliminated by *Smith* and (one hopes) restored by RFRA. I also concluded that, as a matter of faith, Mormon beliefs and the particular experience of Mormons with religious persecution in the United States suggested that Mormons ought to support RFRA so long as there exists the possibility that it will enhance freedom for religious minorities.[2]

Still, much of my skepticism remains. In addition to the potential problems that RFRA presents under section five of the Fourteenth Amendment,[3] it seems fair to consider why there is such a push to re-install the doctrinal regime that brought us *Lee*, *Goldman*, and *Lyng*, to name a few of the low points in the Supreme Court's dubious pre-*Smith* interpretations of the Free Exercise Clause.[4] Indeed, in *Smith* itself Justice O'Connor would

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1. 42 U.S.C. § 2000bb to 2000bb-4 (Supp. V 1993).

2. Frederick M. Gedicks, *The Integrity of Survival: A Mormon Response to Stanley Hauerwas*, 42 DEPAUL L. REV. 167 (1992).

3. *See, e.g.*, Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39 (1995).

4. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (Free Exercise Clause does not prevent federal government from implementing land use plan that would destroy native American religion); Goldman v. Weinberger, 475 U.S. 503 (1986) (denying orthodox Jewish serviceman exemption from uniform regulation which prevented his wearing a yarmulke); United States v. Lee, 455 U.S. 252 (1982) (denying Amish employer exemption from payment of social security taxes).

have relied on the compelling state interest test to deny the religious claimants relief.[5] To my friend Chip Lupu, I say that he ought not worry about broad interpretations of RFRA[6] because the early indications are that the well-practiced techniques of narrow construction and crabbed application that gutted the compelling interest test the first time around are still very much with us.[7]

Even if RFRA does not wholly fail as law, I believe that it will enjoy only modest success. Although there are bound to be more victories for religious minorities under RFRA than under *Smith*, there does not seem to be any greater reason now than before *Smith* to think that courts will interpret and apply the compelling interest test under RFRA more charitably than they applied the old *Sherbert-Yoder* doctrine.[8] I will begin by briefly explaining why I believe this is so.[9] Following that, I will spend some time dealing with a more complicated and interesting question: Assuming that RFRA has limited influence as law, might it not be more successful in some other way, as something else? I will explore this question first by relating some insights of the French philosopher Jacques Derrida into the tension between law and justice,[10] and then by applying these insights to RFRA and religious liberty.[11]

I.

When *Smith* was handed down late in the 1989 Term, it was immediately and widely criticized.[12] The vehemence of the criticism suggested that the Supreme Court had abandoned a doctrine deeply embedded in the American constitutional tradition. The historical record suggests the opposite. Although the idea of

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5. *See* 494 U.S. 872, 905-06 (1990) (O'Connor, J., concurring).

6. *See* Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171 (1995).

7. *See, e.g.*, Christians v. Crystal Evangelical Free Church (*In re* Young), 152 B.R. 939 (Bankr. D. Minn. 1993) (finding that contributions to church are "avoidable" under Bankruptcy Code did not violate RFRA's compelling interest test).

8. Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

9. *See infra* Part I.

10. *See infra* Part II.

11. *See infra* Part III.

12. *See, e.g.*, James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 94-99 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 2-3; Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 233-34 (1991).

judges' exempting religious believers from the burdens of generally applicable law was not unknown in the founding era,[13] cases reporting such exemptions are rare. The *Mormon Polygamy Cases*[14] are the most notorious example of judicial hostility to religious exemptions, but they are not aberrations. In the 1960s, Marc Galanter reported that he had been able to find only one decision before 1940 in which a claim of religious liberty was accepted as a defense to criminal liability.[15] At the Supreme Court's level, judicial hostility to exemptions was evident as late as 1961 in *Braunfeld v. Brown*, when the Court denied an orthodox Jewish businessman's claim that a Sunday closing law put him at a competitive disadvantage and threatened the economic viability of his business.[16] The Court refused to grant him an exemption from the law because doing so might have undermined the law's purpose of providing a uniform day of rest, relaxation, and family togetherness.[17] This was, to be sure, a legitimate legislative goal, but hardly a compelling one, especially since other jurisdictions had provided such an exemption without suffering any of the problems the Court had imagined.[18]

The difficulty for religious freedom under an exemption regime like that of the *Sherbert-Yoder* doctrine reinstated by RFRA is that the norm of liberal neutrality that informs the Court's interpretations of the Free Exercise Clause does not have the theoretical resources to justify relieving burdens on religious practice caused by government action that is fully justified on secular grounds. Liberal neutrality requires that government remain aloof from the private choices of individuals, intervening only to protect classical conceptions of life, liberty, and property.[19] Liberal neutrality recognizes religion only to the extent that it can be understood through the categories of individuality and secularity.[20] It thus permits religion to manifest itself in

13. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1511-12 (1990).

14. Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890); Davis v. Beason, 133 U.S. 333 (1890); Murphy v. Ramsey, 114 U.S. 15 (1885); Reynolds v. United States, 98 U.S. 145 (1878).

15. Marc Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 234.

16. 366 U.S. 599, 601-02 (1961).

17. *Id.* at 607-09.

18. *See id.* at 614-15 (Brennan, J., concurring in part and dissenting in part).

19. *See* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 66 (1987); ROBERTO M. UNGER, KNOWLEDGE & POLITICS 73, 89 (2d ed. 1984); Joel F. Handler, *Dependent People, the State and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. REV. 999, 1060-61 (1988).

20. *Cf.* PHILIP B. KURLAND, RELIGION AND THE LAW (1962) (arguing that reli-

public life only as the effect of private, individual choice. For example, government can maintain a position of neutrality with respect to, and thus avoid constitutional responsibility for, financial aid to religion so long as the aid is funnelled to individuals pursuant to broad, secularly defined beneficiary categories.[21] Under these circumstances, the government has not distorted the "natural" pattern of private choice by creating a special benefit available only to religious institutions. The fact that some, or even most, of such aid ultimately ends up in the coffers of religious institutions is not chargeable to the government because the decision to spend the aid to benefit religion is made by the individual recipient and not the government itself.[22]

This private choice analysis has permitted the Court to uphold against Establishment Clause challenges a variety of government actions which assist religion.[23] But the same analysis that permits aid to religion under the Establishment Clause cuts in a different direction under the Free Exercise Clause. To excuse religious individuals from compliance with generally applicable law, solely because of religious belief, distorts the pattern of private religious choice by creating a benefit available only to believers.[24] Put another way, if the Establishment Clause does not require that religious individuals be uniquely deprived of

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gion should not be used as a basis for government classifications); William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983) (arguing that religious expression should receive constitutional protection under the Free Exercise Clause only if analogous secular expression would be protected by the Free Speech Clause).

21. *See, e.g.*, Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 482-83, 487-88 (1986); Mueller v. Allen, 463 U.S. 388, 399-400 (1983).

22. *See, e.g., Witters*, 474 U.S. at 488 (because "the decision to support religious education is made by the individual, not by the State, . . . it does not seem appropriate to view any aid ultimately flowing to the Inland Empire School of the Bible as resulting from a *state* action sponsoring or subsidizing religion."); Mueller v. Allen, 463 U.S. 388, 399 (1983) ("Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally.") (citation omitted) (quoting Widmar v. Vincent, 454 U.S. 263, 274 (1981)).

23. *See, e.g.*, Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993) (government-paid interpreter for deaf student attending parochial high school); Lamb's Chapel v. Center Moriches Sch. Dist., 113 S. Ct. 2141 (1993) (religiously oriented film series shown in high school auditorium); Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (plurality opinion) (student sponsored prayer and Bible study group meeting as extra-curricular high school activity); *Witters*, 474 U.S. 481 (educational disability benefits applied to help blind person obtain ministerial degree); Mueller v. Allen, 463 U.S. 388 (1983) (tax deductions for certain private school expenses); Widmar v. Vincent, 454 U.S. 263 (1981) (student sponsored prayer and Bible study group meeting on state university campus).

24. KURLAND, *supra* note 20, at 41.

public welfare benefits otherwise generally available to all, as is frequently argued, then under the same premise the Free Exercise Clause does not require that religious individuals be uniquely relieved of legal burdens otherwise generally imposed upon all.[25] This general principle is familiar in other areas of constitutional law and, indeed, Justice Scalia cited it in *Smith*.[26]

Liberal neutrality seems to foreclose the possibility of a *religious* exemption to generally applicable laws precisely because such exemptions distort private religious choice. Just as financial aid to religious individuals under the Establishment Clause is constitutional only when it can be justified by secular principles, exemptions from the unintended burdens of generally applicable laws are constitutional only if they are not defined in terms of religion.[27] In this circumstance, conduct is protected (or not) based upon whether it falls within the secularly defined boundaries of the exemption, regardless of any religious motivation for the conduct. Bill Marshall was right: The Supreme Court does not protect religion unless the religious exercise at issue fits within the secular notion of free speech or some constitutional

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25. *See* Ferdinand F. Fernandez, *The Free Exercise of Religion*, 36 S. CAL. L. REV. 546, 589 (1963); Jonathan Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, 73 YALE L.J. 593, 618 (1964); *see also* KURLAND, *supra* note 20, at 22 ("To permit individuals to be excused from compliance with the law solely on the basis of religious beliefs is to subject others to punishment for failure to subscribe to those same beliefs."); Weiss, *supra*, at 623:

> The task is to discern whether religion forms a variable in the statute's formulation or application by seeing whether an assumption or decision on a perspective of belief is called for. If so, then the statute is unconstitutional. If not, then religion can form neither a defense to its application nor a justification after application for calling the statute unconstitutional.

26. *See Smith*, 494 U.S. at 878 (quoting the text of the Religion and Press Clauses of the First Amendment:

> It is no more necessary to retard the collection of a general tax, for example, as "prohibiting the free exercise [of religion]" by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as "abridging the freedom . . . of the press" of those publishing companies that must pay the tax as a condition of staying in business).

27. *Compare* Texas Monthly v. Bullock, 489 U.S. 1 (1990) (sales tax exemption granted only to religious magazines violates Establishment Clause) *with* Walz v. Tax Comm'r, 397 U.S. 664, 687-89, 693 (1970) (Brennan, J., concurring) (religious property tax exemption does not violate Establishment Clause when comparable exemptions are also granted to secular nonprofit organizations). *See also* Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 592 (1991) ("The Court tends to uphold [programs of aid to religious organizations] only if they exhibit a breadth of coverage sufficient to include nonreligious organizations.").

category other than the free exercise of religion.[28]

Corporation of the Presiding Bishop v. Amos is the exception that proves the rule. In that case, an employee of the Mormon church was terminated for failing to comply with certain religious standards of conduct which were unrelated to the performance of his job.[29] The employee had no action against the church for religious discrimination because section 702 of the Civil Rights Act of 1964 exempts religious groups from anti-discrimination provisions that burden religious belief and practice.[30] Accordingly, the employee challenged this exemption as an unconstitutional establishment of religion, arguing that it amounted to government action that advanced religion.

Why are religious groups, but not other organizations involved in First Amendment activities, entitled to this exemption from anti-discrimination laws? The answer is not to be found in the majority opinion upholding the exemption, which plods through a thoroughly unilluminating exposition of the *Lemon* test. Only Justice Brennan recognized what was truly at stake in the challenge to the exemption—whether religion has a special status under the Constitution. The real ground for the exemption, as Brennan made clear, is the recognition that religious groups make unique contributions to individuals and society that might be lost without an exemption.[31] But liberal neutrality cannot justify this position because it presupposes that the value of the religious group lies expressly in terms of its religiosity and community, rather than its secularity and individuality.[32]

A test that cannot be justified by the theoretical underpinnings of the doctrine it purports to apply cannot look forward to

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28. *See* Marshall, *supra* note 20.

29. Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 330, 332 (1987).

30. *See* 42 U.S.C. § 2000e-1 (1988 & Supp. IV 1992).

31. 483 U.S. at 341-43. I explored this argument in detail in Frederick M. Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99.

32. *See* 483 U.S. at 342 (Brennan, J., concurring):

> For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic activity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.

a long and vigorous life. I would, therefore, expect the same narrow, crabbed interpretations of the compelling interest test under RFRA as it received under the *Sherbert-Yoder* doctrine. In sum, the only way to justify doctrinally the special constitutional protection of religion is with a theory which explains both why religion is special, and why constitutional rights are held by groups as well as individuals. Liberal neutrality supplies neither.

II.

Ironically, the failure of RFRA as law might open the possibility that it would do justice. Several years ago, Jacques Derrida delivered a lecture entitled "Force of Law: The 'Mystical Foundation of Authority.'"[33] Among other things, Derrida examines justice in a society governed by the rule of law. How does justice work? How does a just decision happen? Justice, Derrida says, is an "aporetic" experience, an "experience of the impossible."[34] In philosophy, an "aporia" is what one calls an obstacle or stopping point in the rational progression of an argument; it is a missing logical piece that throws the conclusion of the argument into doubt.[35]

Derrida argues that justice has (at least) three aporetic qualities. First, justice exceeds the calculation of the law at the same time that it is legitimated by law. Second, because it is legitimated by law, justice cannot escape the originary violence that is at the foundation of all law. Third, justice has an unpredictable, overflowing character that prevents one from being sure, at the moment of the just decision, whether justice will really be done. I will discuss each of these in turn, illustrating them with examples drawn from *Plessy v. Ferguson*,[36] *McLaurin v. Oklahoma State Regents*,[37] and *Brown v. Board of Educa-*

33. *Force of Law: The "Mystical Foundation of Authority"* (Mary Quaintance trans.) *in* DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 3 (Drucilla Cornell, Michel Rosenfeld & David Gray Carlson ed. 1992) [hereinafter Derrida, *Force of Law*].

34. *Id.* at 16.

35. *See, e.g.*, NICOLA ABBAGNANO, DIZIONARIO DI FILOSOFIA 58 (Milan, 1990) (defining "aporia" as "a *rational* doubt, that is, a difficulty inherent to an argument and not a subjective state of uncertainty," "an *objective* doubt") (author's translation); *Cf.* JACQUES DERRIDA, APORIAS 12 (Thomas Dutoit trans. 1993) [hereinafter DERRIDA, APORIAS] (characterizing an "aporia" as the experience of "the 'not knowing where to go,'" "the point where the very project or the problematic task becomes impossible and where we are exposed, absolutely, without protection, without problem, and without prothesis, without possible substitution").

36. 163 U.S. 537 (1896).

37. 339 U.S. 637 (1950).

tion.[38] These cases are especially good for this purpose because *Brown* is one of the few individual rights decisions in recent memory that is uniformly and uncontroversially acclaimed as just, while *Plessy* is one of the most infamously unjust decisions ever rendered by the Court.[39]

A.

First, Derrida argues that justice is not calculable. In contrast to law, where a decision is guaranteed by reference to a rule, Derrida suggests that justice is the experience of a legal problem to which the "just" solution cannot be defended by a rule:

> Law (*droit*) is not justice. Law is the element of calculation, and it is just that there be law, but justice is incalculable, it requires us to calculate with the incalculable; and aporetic experiences are the experiences, as improbable as they are necessary, of justice, that is to say of moments in which the decision between just and unjust is never insured by a rule.[40]

We always find ourselves between these two poles, says Derrida, between a law "which claims to exercise itself in the name of justice," and a justice that "is required to establish itself in the name of a law that must be 'enforced.'"[41] To be just, a decision must both follow a rule, and re-invent it. "[I]f the rule guarantees [the decision] in no uncertain terms, so that the judge is a calculating machine," argues Derrida,

> we will not say that he is just, free and responsible. But we also won't say it if he doesn't refer to any law, to any rule or if, because he doesn't take any rule for granted beyond his own interpretation, he suspends his decision, stops short before the undecidable or if he improvises and leaves aside all rules, all principles.[42]

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38. 349 U.S. 294 (1955); 347 U.S. 483 (1954).

39. Other candidates would include *Korematsu v. United States*, 323 U.S. 214 (1944); *Lochner v. New York*, 198 U.S. 45 (1905); and *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

40. Derrida, *Force of Law*, *supra* note 33, at 16; *see also* DERRIDA, APORIAS, *supra* note 35, at 16 (using "aporia" for "a *single duty* that recurrently duplicates itself interminably" in the form of an experience of "a responsible decision [that] must obey an 'it is necessary' that owes nothing, it must obey a *duty that owes nothing in order to be a duty*, a duty that has no debt to pay back, a duty without debt and therefore without duty").

41. Derrida, *Force of Law*, *supra* note 33, at 22.

42. Derrida, *Force of Law*, *supra* note 33, at 23; *see also* HANS-GEORG GADAMER, TRUTH AND METHOD 307-41 (Joel Weinsheimer & Donald G. Marshall rev.

In other words, if a decision is made without recourse to a rule, then it is lawless and arbitrary, and by definition cannot be called just.[43] Yet, if a decision is compelled by application of a rule, there is no freedom in making the decision—it is, after all, compelled by the rule—and thus there can be no responsibility for its consequences.[44] While this latter kind of decision may be legal because it conforms to law, it cannot be called just; the lack of responsibility and freedom on the part of the judge who renders it will prevent us from calling it just. Thus, a just decision simultaneously applies and undermines a legal rule.

In *McLaurin*, the last educational segregation case decided by the Supreme Court before it overruled *Plessy* in *Brown*, the Court considered whether the conditions under which George McLaurin was permitted to attend the University of Oklahoma Law School were consistent with *Plessy's* "separate but equal" rule. Specific places in class, in the library, and in the cafeteria were set aside for students of color like McLaurin; the other (white) students were not permitted to sit in these places.[45] The state argued that the restrictions were constitutionally insignificant because the student had access to precisely the same facilities as the other students, the places he was assigned to sit had no apparent disadvantages, and he was permitted to mingle with

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trans., 2d rev. ed. 1990) (arguing that it is not meaningful to discuss the existence of a rule outside of its application to a particular problem).

43. *See* DERRIDA, APORIAS, *supra* note 35, at 17:

> In order to be responsible and truly decisive, a decision should not limit itself to putting into operation a determinable or determining knowledge, the consequence of some preestablished order. But, conversely, who would call a decision that is without rule, without norm, without determinable or determined law, a decision? Who will answer for it as if for a responsible decision, and before whom? Who will dare call duty a duty that owes nothing, or, better (or worse), that *must owe nothing*?

44. *See* Jacques Derrida, *The Other Heading: Memories, Responses, and Responsibilities in* THE OTHER HEADING: REFLECTIONS ON TODAY'S EUROPE 4, 41, 44-45 (Pascale-Anne Brault & Michael B. Naas trans. 1992); *see also id.* at 71:

> To have at one's disposal, already in advance, the generality of a rule as a solution to the antinomy . . . , to have it at one's disposal as a given potency or science, as a *knowledge* and a *power* that would precede, in order to settle it, the singularity of each decision, each judgment, each experience of responsibility, to treat each of these as if they were a case—this would be the surest, the most reassuring definition of *responsibility as irresponsibility*, of ethics confused with juridical calculation, of a politics organized within techno-science.

45. *McLaurin*, 339 U.S. at 640.

the other students at all other times.[46] Nevertheless, the Court held that the student was "handicapped in his pursuit of effective graduate instruction" because the state had "set [him] apart from the other students" and thereby impaired his ability "to study, to engage in discussions and exchange views with other students and, in general, to learn his profession."[47]

Now, notwithstanding all the cultural changes that have taken place in the last two generations, it could hardly have been much less obvious in 1950 than it is in 1994 that forcing McLaurin to put up with racial humiliation as the price of a state sponsored legal education was both unfair and inequitable. But in 1950, there was no constitutional rule that permitted a court to strike down racial restrictions on such grounds. What the Court was stuck with, unless it wanted to overrule *Plessy*, was the "separate but equal" rule which provided that a State might separate its citizens by race so long as the segregated facilities were substantially the same. Applying this rule, the Court found that although Oklahoma had provided McLaurin access to virtually the same physical facilities it provided to white students, it had done so only on condition that McLaurin submit to racial humiliation, thereby denying him the equal protection of the laws. Yet *Plessy* had never been applied so as to protect racial humiliation *simpliciter*; indeed, the principal purpose of the Jim Crow laws that *Plessy* upheld was precisely to remind African-Americans that society considered them inferior.[48] Finding for McLaurin was clearly just, but to find for him under the rule of *Plessy* required an application of the rule that fatally undermined it.[49] On the other hand, to have found for

46. *Id.* at 641.

47. *Id.*

48. DAVID R. GOLDFIELD, BLACK, WHITE, AND SOUTHERN: RACE RELATIONS AND SOUTHERN CULTURE 2-12 (1990); *see also* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 106-07 (1975):

> In the South, where under slavery the races had lived in close touch and the mastery of the white man was at all times explicit, the free black man was now shoved farther out of the way lest physical mingling be taken as a tacit sign of unacknowledged equality. Stripping the Negro of his civil rights by statute and custom in a fashion sanctioned by the nation's highest court was not enough. Jim Crow, begun on passenger trains, spread rapidly.

49. *Cf.* Philip B. Kurland, "Brown v. Board of Education *was the Beginning"—The School Desegregation Cases in the United States Supreme Court: 1954-1979*, 1979 WASH. U. L.Q. 309, 313 (noting that *McLaurin* and *Brown* were fundamentally inconsistent).

McLaurin without reliance on *Plessy*, that is, without citing a rule, would have been lawless and arbitrary, a decision without law and therefore by definition unjust.

In fact, when just a few years later *Brown* explicitly declared what had been implicit in *McLaurin*,[50] constitutional law scholars spent the better part of a generation attempting to defend the decision with the then-existing resources of constitutional doctrine.[51] Yet it is precisely *Brown*'s break from precedent in contrast to *McLaurin*'s attempt to remain faithful to it—*Brown*'s legal incalculability against *McLaurin*'s calculation—that makes *Brown* an opinion rightly famous for having declared justice, and *McLaurin* a mere doctrinal footnote.

B.

The second aporetic quality of justice identified by Derrida stems from the inescapable connection between law and violence. Derrida's point here is not simply that violence supplements law or often accompanies its application; rather, it is that the very concept of law, even law that might be called "just," implies the application of some kind of force. This is the sense of the expression in English, "to enforce the law":

> The word "enforceability" reminds us that there is no such thing as law (*droit*) that doesn't imply *in itself, a priori, in the analytic structure of the concept*, the possibility of being "enforced," applied by force. There are, to be sure, laws that are not enforced, but there is no law without enforceability, and no applicability or enforceability of the law without force, whether this force be direct or indirect, physical or symbolic, exterior or interior, brutal or subtly discursive and hermeneutic, coercive or regulative, and so forth.[52]

From here, Derrida examines the distinction between legitimate and illegitimate uses of force. "What difference is there," he asks, "between, *on the one hand*, the force that can be just, or in any

50. *See Brown*, 347 U.S. at 494, 495 (concluding that "[s]eparate education facilities are inherently unequal" because segregation "generates a feeling of inferiority as to [African-American students'] status in the community that may affect their hearts and minds in a way unlikely ever to be undone").

51. *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-34 (1959) (questioning the constitutional basis for *Brown*); Kurland, *supra* note 47, at 316-17 (arguing that *Brown*'s reasoning did not support its result).

52. Derrida, *Force of Law*, *supra* note 33, at 5-6.

case deemed legitimate . . . , and *on the other hand* the violence that one always deems unjust?"[53] The answer turns out to be, not very much. The very rules that permit legal calculation, that render a decision legitimate, are themselves marked by violence. Citation of a rule in defense of a decision only defers the question whether the decision is just to the origin of the rule, its founding or institution. Violence is always present at the origin, because that is where the question of justice has been resolved by force rather than by rational persuasion.[54] Some kind of violence necessarily precedes the institutions that thereafter legitimate laws that are enforced by violence. There is no clear difference between the legitimate violence that enforces the law, and the illegitimate violence that is deployed without law, because the former is ultimately traceable to the latter. Therefore, if we try to account for justice with laws, we must always mark justice with violence. It is almost as if justice must escape the law to manifest itself as truly just.

Despite the obvious justice of its holding, even *Brown* is marked by originary violence in this manner. Concluding that "[s]eparate educational facilities are inherently unequal," the Supreme Court in *Brown* held that segregation in public education denied racial minorities the equal protection of the laws in violation of the Fourteenth Amendment.[55] While this amendment was formally adopted by two-thirds of each house of Congress and ratified by three-fourths of the states, a number of former Confederate states whose ratification was necessary to the promulgation of the amendment did so under threat of violence.[56] These states were occupied by federal troops when the amendment was presented, and ratification was one of the preconditions for removing the troops.[57] Of course, the troops had

53. *Id.* at 6.

54. *Id.* at 23-24.

55. 347 U.S. at 495.

56. Although the amendment was ratified by three-fourths of the former Union states within a year of ratification, this was not regarded by the great majority of Americans as sufficient to make the amendment binding as part of the Constitution. *See* HORACE E. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 189 (1908). It was not until Alabama, Arkansas, Florida, Georgia, Louisiana, North Carolina, South Carolina, and Tennessee each ratified the amendment, thereby giving it the approval of three-fourths of all of the states (including those formerly part of the Confederacy), that the amendment was declared part of the Constitution. *See id.* at 163-65, 190-91. Mississippi, Texas, and Virginia each ratified later. *See id.* at 191.

57. *See* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5, 81-82, 84, 126 (1949). Governors of a number of the former Confederate states urged ratification of the

gotten there in the first place only because they had won the Civil War, still the bloodiest conflict in American history. The War itself was an action of questionable legality under the Constitution, since it was at best unclear whether the federal government was constitutionally empowered to use force to prevent the unilateral withdrawal of member states or to free African-American slaves.[58]

C.

The last aporia of justice discussed by Derrida is linked to its performative rather than descriptive quality. Derrida here contrasts two categories from speech-act theory, performative and constative statements.[59] Constatives are simply reports, descriptions of the world. As such, they cannot be just, but only precise or accurate, as in, "John and Mary were married last night." Performatives, on the other hand, are actions. They do something or make something happen in the world, as in "By the authority vested in me, I now pronounce John and Mary to be husband and wife." One of the authoritative texts in speech-act theory, John Austin's *How to Do Things with Words*, evokes the meaning of the performative.[60]

Justice is something that is done, not something that is reproduced or represented.[61] As actions, performatives can possess or lack the quality of justice; as mere reports, constatives

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amendment to speed the removal of federal troops from their borders and hasten the return of self-government. *See* FLACK, *supra* note 56, at 194-95, 200-04. After troops were finally removed from these states as part of the settlement of the disputed Hayes-Tilden election of 1876, most of the rights gained by African-Americans during the Reconstruction era were lost within a generation. *See* John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 WASH. U. L.Q. 421.

58. For example, under the theory of federalism argued by the Southern states prior to the war, the federal government was not an independent sovereign, and could act only as the agent of the states pursuant to the powers delegated to it by them, which powers could be withdrawn at will. *See* Earl Maltz, *Reconstruction without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment*, 24 HOUS. L. REV. 221, 230-32 (1987). This theory continued to be argued even by some Republicans in the Reconstruction Congress. *Id.* at 233.

59. Derrida, *Force of Law*, *supra* note 33, at 26-27.

60. JOHN AUSTIN, HOW TO DO THINGS WITH WORDS (1958). *See also* John Searle, *How Performatives Work*, 58 TENN. L. REV. 371, 372 (1991) (defining a "performative" as "an illocutionary act that can be performed by uttering a sentence containing an expression that names the type of speech act, as in for example, 'I order you to leave the room'").

61. *Cf. Micah* 6:8 (King James) ("[W]hat doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God?").

cannot. But it seems that we never know enough before doing justice. "A just decision is always required immediately," Derrida says, "right away . . . ."[62] One can never gather in advance sufficient "facts" and other knowledge to render a decision that takes everything into account, to be sure that the performance of justice will, in fact, be just. Justice always requires a leap of faith, a hope that the just decision will, in fact, do justice. "Paradoxically," Derrida declares,

> it is because of this overflowing of the performative, because of this always excessive haste of interpretation getting ahead of itself, because of this structural urgency and precipitation of justice that the latter has no horizon of expectation . . . . But for this very reason, it *may* have an *avenir*, a "to-come" . . . .[63]

Because the just decision exceeds calculation and law, it may push, it usually *will* push the notion of justice "beyond the already identifiable zones of morality or politics or law . . . ."[64] Because of this, Derrida calls the instant of decision, when justice must be rendered (or not), a kind of "madness."[65] We must always "wait and see" if the apparently just decision we have made does indeed, in the end, truly perform justice.

As most legal scholars know, there are actually two *Browns*; the first, decided in 1954, abandoned *Plessy*,[66] while the second, decided a year later, determined that the Southern states were not required to dismantle their system of segregated schools immediately but only "with all deliberate speed."[67] In other words, although the Court was finally willing to hold that "separate but equal" violated the Constitution, it was unwilling to order the South to abandon the practice "right away." The Court knew that any order prohibiting segregation in education would have been ignored by the South (and much of the North) unless federal law enforcement resources were deployed to enforce it, and the Court was concerned in 1954 (not without reason) that the executive branch lacked the will to carry out a desegregation order, even if issued by the Supreme Court.[68] It was not until four years after its original decision, when the Court's power to

62. Derrida, *Force of Law*, *supra* note 33, at 26.
63. *Id.* at 27.
64. *Id.* at 28.
65. *Id.* at 26.
66. *Brown*, 347 U.S. at 495.
67. Brown v. Board of Educ., 349 U.S. 294, 301 (1955).
68. *See* KLUGER, *supra* note 48, at 752-54.

interpret authoritatively the Constitution was directly challenged, that federal power was deployed to enforce *Brown*'s holding.[69] Even after that, the Court continued to cite *Brown* sparingly and with restraint. The Court finally lost its patience and began seriously to enforce *Brown* in the early 1960s.[70] In the immediate aftermath of *Brown*, it was unclear whether the case was to become a fatal blow against segregation, or yet another *Shelley v. Kramer*[71]—that is, a stillborn decision that has had no effect beyond a narrow reading of its own facts. It was only an eventual hardening of resolve to enforce fully the original holding of *Brown* by all three branches of the federal government in the 1960s that finally resulted in the performance of something that might be called justice. Even so, today there are still scholars willing to criticize *Brown* as not having significantly advanced the cause of African-American civil rights.[72]

III.

And now, finally, to religious freedom and RFRA. RFRA's compelling interest test was first adopted in free exercise doctrine by *Sherbert v. Verner*, in which the Court ordered a state to pay unemployment benefits to a Seventh-Day Adventist even though she would not make herself available for work on Saturday (her Sabbath) as required by the state's unemployment compensation law.[73] The state argued that protecting the integrity of the unemployment insurance fund against depletion by those who "feign[ ] religious objections to Saturday work" and facilitating the scheduling by employers of necessary Saturday work were sufficient reasons to deny the benefits.[74] In *Sherbert*, however, the Supreme Court announced that government could burden a fundamental right like the free exercise of religion only if

69. Cooper v. Aaron, 358 U.S. 1 (1958).

70. *See, e.g.*, Griffin v. County Sch. Bd., 377 U.S. 218 (1964); Goss v. Board of Educ., 373 U.S. 683 (1963).

71. 334 U.S. 1 (1948).

72. *See, e.g.*, Ronald R. Edmonds, *Effective Education for Minority Pupils:* Brown *Confounded or Confirmed, in* SHADES OF *BROWN*: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 109 (Derrick Bell ed. 1980) (arguing that the racial balancing ordered by *Brown* has done little to improve the education of African-American children); Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994) (arguing that racial change was inevitable, and that *Brown* only served to stiffen Southern resistance to this change and delay its implementation).

73. 374 U.S. 398 (1963).

74. *Id.* at 407.

the government's action was necessary to a "compelling" regulatory interest that could not be protected in any less intrusive manner.[75]

The Court had never before held that governmentally imposed burdens on religion must be justified by more than a rational basis. In fact, all of the decisions cited by the Court in *Sherbert* in support of this holding involved either racial discrimination or unjustified regulation of expression—two areas in which the compelling interest standard had been used for many years.[76] Moreover, as I have related, just two years before *Sherbert*, the Court had refused in *Braunfeld* to apply anything like the compelling interest standard to burdens on the free exercise of religion.

The *Sherbert* majority attempted to distinguish *Braunfeld* on the ground that an exemption in that case would have completely frustrated the government's purpose in enacting Sunday closing laws.[77] Even conceding this factual premise, the argument is unpersuasive. If an individual suffers a constitutionally significant deprivation of liberty when forced to choose between temporary economic benefits and faithfulness to religious conscience, as *Sherbert* held, then surely the deprivation of liberty is even greater when the cost of faithfulness is loss of a lifetime of financial and human capital invested in a small business,[78] as the plaintiff claimed in *Braunfeld*.[79] If one balances the state's interest against the individual's deprivation of liberty, it would seem that even a substantial undermining of the state's interest in providing for a uniform day of rest and relaxation does not seem to outweigh the *Braunfeld* plaintiff's loss of his business.

Braunfeld was a straightforward application of the belief-action doctrine originally announced by the Court in *Reynolds v. United States*, in which the Court refused to find a constitutionally compelled exemption from anti-bigamy laws for Mormon polygamists.[80] The Court determined that, while "Congress was deprived of all legislative power over mere opinion" by the Free Exercise Clause, it was "left free to reach actions which were in

75. *Id.* at 403, 406-07.

76. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944).

77. 374 U.S. at 408-09.

78. *See* Galanter, *supra* note 15, at 279; Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development—Part I: The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1401 (1967).

79. *See* 366 U.S. at 611 (Brennan, J., dissenting).

80. 98 U.S. 145 (1878).

violation of social duties or subversive of good order."[81] The Court reasoned that, because laws are enacted precisely to regulate actions, it would be anomalous to excuse illegal actions simply because they were religiously motivated.[82]

The distinction between belief and action had controlled the disposition of free exercise claims through the remainder of the nineteenth and into the twentieth century, ensuring that such claims remained almost completely ineffective in securing relief for individuals who found exercise of their religious beliefs burdened by general laws. When the Supreme Court renewed its interest in the religion clauses in the 1940s, it reaffirmed the distinction. In *Cantwell v. Connecticut*, which applied the Free Exercise Clause to the states through the Due Process Clause of the Fourteenth Amendment, the Court interpreted the constitutionally protected freedom of religion to encompass both freedom of belief and freedom of action.[83] However, while the Court found religiously motivated belief to be absolutely protected, it held that religiously motivated conduct, "in the nature of things," was "subject to regulation for the protection of society."[84] Under the belief-action doctrine, the Free Exercise Clause deprived government of any authority to punish a person for his or her religious *beliefs*, but did not affect the authority of government to regulate religiously motivated *actions* so long as there existed a public interest rationale for the regulation. Since the government can always meet this light burden of justification, the belief-action doctrine effectively foreclosed the possibility of constitutionally compelled free exercise exemptions.[85]

Sherbert clearly did justice by granting to Sabbatarians and other nonSunday worshippers the same unemployment benefits that are available to Christians by virtue of their majority status. It is equally clear, however, that the Court's decision in *Sherbert* was not defensible by reference to any rule that was previously in force regarding the free exercise of religion. *Sherbert* is simply not persuasive as a calculation of precedent. Although the Court purported to rest its decision on the belief-action doctrine of *Reynolds* and *Braunfeld*, its extension of the compelling interest doctrine to burdens on religious exercise effectively eliminated the belief-action doctrine as a rule of con-

81. *Id.* at 164.
82. *Id.* at 166.
83. 310 U.S. 296 (1940).
84. *Id.* at 303-04.
85. *See* Galanter, *supra* note 15, at 235.

stitutional decision. The justice of this decision required a simultaneous application and undermining of the rule the Court applied.

The originary violence mentioned by Derrida marks *Sherbert* as well. The First Amendment followed the Revolutionary War and was drafted pursuant to an amendment process, provided by a constitutional convention, that exceeded its original mandate of refining the Articles of Confederation.[86] One can also mention the very narrow popular base of support for the Free Exercise Clause in both the Congress that enacted the First Amendment and the state legislatures that ratified it—no women nor any Native Americans, African-Americans, or other racial minorities served in these bodies, and hardly any religious minorities were present; rather, these bodies were composed almost exclusively of propertied, white, Protestant males. And the Court cites the Fourteenth Amendment, whose violence I have already discussed, as the basis for applying the First Amendment's guarantee of free exercise to the states.[87]

Perhaps most interesting is that the language of the *Sherbert* test has violence inscribed in its very text. The test states that a "compelling state interest" that cannot be affected by any "less restrictive means" justifies an infringement of a religious claimant's right to exercise his religion. Think a moment about what this means. It seems to impose a higher burden of justification on the government, yet this burden is illusory. Can there be any doubt that if the compelling state interest test had been deployed against the Mormons in the nineteenth century, a compelling state interest in preserving monogamous marriage would have been articulated to justify the persecution of the Mormons that actually occurred? Is it an accident that under this test most religious claimants that have come before the Supreme Court (and virtually every religious minority) have been denied relief under the Free Exercise Clause?[88] It is true that the gov-

86. CATHERINE D. BOWEN, MIRACLE AT PHILADELPHIA 4, 226, 311-12 (1986).

87. Sherbert v. Verner, 374 U.S. 398, 410 (1963).

88. No Muslim, Jewish, or Native American plaintiff has ever prevailed on a free exercise claim before the Supreme Court. *See, e.g.*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (holding that Free Exercise Clause does not prevent federal government from implementing land use plan for government land that would destroy Native American religion); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (denying Muslim prison inmates exemption from policy which prevented them from attending worship services); Bowen v. Roy, 476 U.S. 693 (1986) (holding that Free Exercise Clause does not prevent government from assigning social security number to Native American child in violation of parent's religious

ernment sometimes lost under the compelling interest test, whereas it never lost under the belief-action doctrine, but this is only a difference in the amount of violence inflicted on religious believers, and not a distinction between violence and the lack thereof.

That brings me to the *avenir*, the "to-come," of the *Sherbert-Yoder* test (and, for a time, it *did* have a future as constitutional doctrine). When *Sherbert* was decided in 1963, the courts in the United States had at least a century-long tradition of refusing to relieve believers from the burdens of generally applicable laws so long as the laws had a rational basis. To hold that government could burden a religious belief only in pursuit of a compelling interest, as *Sherbert* did, was a clear break from tradition. The break became even more dramatic when, not quite ten years after *Sherbert*, the Court held in *Wisconsin v. Yoder* that the Free Exercise Clause required government to provide a compelling justification for any refusal to grant believers exemptions from the law. The *Sherbert-Yoder* doctrine provided both that a law which burdens the free exercise of religion *and* a state's refusal to exempt religious objectors from complying with this law must be justified by a compelling interest.

The compelling interest test is an undeniably strict standard

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beliefs); Goldman v. Weinberger, 475 U.S. 503 (1986) (denying orthodox Jewish serviceman exemption from uniform regulation which prevented his wearing a yarmulke); Braunfeld v. Brown, 366 U.S. 599 (1961) (denying orthodox Jewish merchant exemption from Sunday closing law that threatened economic viability of his business). Fundamentalist Christians and sects outside of so-called "mainline Protestantism" have had only mixed success in seeking exemptions. *Compare Unemployment Compensation Cases*, 489 U.S. 829 (1989); 480 U.S. 136 (1987); 450 U.S. 707 (1981); 374 U.S. 398 (1963) (reversing denials of unemployment benefits to nondenominational Christian, Seventh Day Adventist, and Jehovah's Witness who lost or left employment for reasons of religious conscience) *and* Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish parents cannot be prosecuted for violation of compulsory school attendance statute) *with* Swaggart v. Board of Equalization, 493 U.S. 378 (1990) (denying television ministry exemption from general tax on sales of Bibles); Jensen v. Quaring, 472 U.S. 478 (1985) (per curiam), *aff'g by an equally divided Court* 728 F.2d 1121 (1984) (denying exemption from driver's license photograph requirement to person who believed photographs were "graven images" in violation of the Ten Commandments); Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985) (denying religious foundation exemption from federal labor regulations); Bob Jones University v. United States, 461 U.S. 574 (1983) (denying Christian university exemption from regulation which denies tax exemption to racially discriminatory educational institutions); United States v. Lee, 455 U.S. 252 (1982) (denying Amish employer exemption from Social Security taxes); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) (denying Jehovah's Witnesses exemption from public school requirement of saluting the flag), *overruled by* Board of Educ. v. Barnette, 319 U.S. 624, 642 (1943); Reynolds v. United States, 98 U.S. 145 (1878) (denying polygamous Mormon exemption from prosecution under anti-bigamy laws).

of review in any context, but it is especially so in free exercise analysis. In deciding in particular cases whether the religious claimant truly holds beliefs which conflict with government action, the Court has always privileged the claimant's interpretation of what his or her beliefs demand over alternative evidentiary sources.[89] In *Thomas v. Review Board*,[90] for example, the Court held that unemployment benefits could not be denied a religious pacifist who quit his job rather than accept a transfer to an armaments factory.[91] In reaching this decision, the Court refused to credit either arguments that the pacifist was inconsistent in the application of his anti-war principles, or the fact that another member of the same religion worked in the factory and found no conflict between his work and his faith.[92] In a later case, *Frazee v. Illinois Department of Employment Security*,[93] the Court found it irrelevant that the religious claimant belonged to no church or organized religious body.[94] Both holdings are consistent with language in an older case, *United States v. Ballard*,[95] in which the Court foreclosed judicial inquiry into the truth or falsity of religious beliefs.[96]

When combined with the Court's deference to the claimant's understanding of what his or her religion requires, the extraordinary protection of religious exercise at least formally granted by the *Sherbert-Yoder* doctrine created a potentially serious law enforcement dilemma: a broad constitutional exemption from compliance with any law which seemed to be available merely for the asking to any person who represented himself as a religious objector.[97] While the sincerity with which an objector ad-

89. Galanter, *supra* note 15, at 267-68. *But see* Gianella, *supra* note 78, at 1419.

90. 450 U.S. 707 (1981).

91. *Id.* at 716-20.

92. *See id.* at 715 ("Thomas' statements reveal no more than that he found work in the roll foundry sufficiently insulated from producing weapons of war. We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one."); *id.* at 716 ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.").

93. 489 U.S. 829 (1989).

94. *Id.* at 832-33.

95. 322 U.S. 78 (1944).

96. *See id.* at 87 (although the religious beliefs of respondents "might seem incredible, if not preposterous, to most people," the truth or falsity of such beliefs may not constitutionally be made an issue in a criminal trial).

97. William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 359 (1989-90); *see also* Galanter,

hered to a belief or tenet formally remained a legitimate inquiry, the Court's hostility towards the investigation of the reasonableness of a claimant's religious beliefs, together with its willingness to credit the claimant's own interpretation of the behavioral requirements of those beliefs, made any inquiry into sincerity problematic. As Stephen Pepper asked some years ago, could the compelling interest test possibly mean so much?[98]

As it happened, the answer was no. The broad mandate of free exercise exemptions that seemed to follow from the *Sherbert-Yoder* doctrine did not pose a serious difficulty when the benefit to be gained from exemption was something few people would actually want, like receipt of unemployment benefits despite being unavailable for work on one's Sabbath, or freedom from prosecution under compulsory school attendance laws.[99] As the Court sardonically observed in *Frazee v. Illinois Department of Employment Security Department*,[100] granting benefits to a Christian who refused to accept Sunday work was unlikely to lead to a mass labor movement opposing Sunday employment,[101] and it was equally unlikely that teenagers (or their parents) would be motivated to relocate to Amish communities and go to work on the farm in order to avoid attending high school. In *United States v. Lee*,[102] however, the Amish asked the Court to grant them a free exercise exemption from paying social security taxes. Perhaps fearing a tidal wave of exemption requests by people claiming that their religious beliefs prevented them from paying any kind of tax at all, the Court found the government's interest in denying the Amish an exemption to be compelling.[103]

Lee marked the beginning of the end of the *Sherbert-Yoder* doctrine. In quick succession, the Court denied free exercise relief to an orthodox Jew who sought to wear a yarmulke in violation of Air Force uniform regulations in *Goldman v.*

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supra note 15, at 270 ("[W]hen this forbearance toward religious objection is combined with the new permissiveness in defining religion, other kinds of possibilities come into view. Dissidents of all kinds—nudists, LSD users, racists, utopians, and groups as yet unimagined—can be expected to present claims for religious freedom.").

98. Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299, 300.

99. *See id.* at 326; *cf.* Fernandez, *supra* note 25, at 547 (the definition of religion is not important when an individual receives little benefit from asserting that his motives are religious).

100. 489 U.S. 829 (1989).

101. *Id.* at 835.

102. 455 U.S. 252 (1982).

103. *Id.* at 260.

Weinberger;[104] to a Native American tribe which sought to prevent construction of a highway that would prevent its members from worshipping in *Lyng v. Northwest Indian Cemetery Protective Association*;[105] and to a televangelist who objected to state taxation of Bible sales in *Swaggart Ministeries v. Board of Equalization of California*.[106] Surveying these decisions, Mark Tushnet concluded that the Court was willing to protect religious exercise only when doing so either was relatively inexpensive or was otherwise consistent with secular constitutional norms like freedom of expression or due process of law.[107] *Smith* merely confirmed what should have been obvious for some time—that despite its holdings in *Sherbert* and *Yoder*, the Court had virtually no commitment to special protection of the free exercise rights of religious minorities. Lacking the resolve it showed in eventually enforcing *Brown*, the Court never allowed the *Sherbert-Yoder* doctrine to grow into a performance of justice; rather, the doctrine became, almost immediately, another *Shelley v. Kramer*.

IV.

Now we have RFRA, an attempt of questionable constitutionality to reinstate a doctrine that historically has been of questionable utility. Leaving aside the question of constitutionality, one can still ask, if the Court had little commitment to protecting the free exercise rights of religious minorities before, what has changed? Is there any reason to think that a Court that failed to apply *Sherbert* and *Yoder* in a meaningful way will apply RFRA in a more meaningful way?

Perhaps there is, and the reason is RFRA itself. Several years ago, Laurence Tribe wrote an essay provocatively entitled, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*.[108] Tribe's point was that Supreme Court decisions are not neutral interventions in a static world; rather, Supreme Court decisions shape the very world they adjudicate, twisting and bending it in a way not unlike the way the gravitational pull of large masses distorts space-time. One of the best

104. 475 U.S. 503 (1986).
105. 485 U.S. 439 (1988).
106. 493 U.S. 378 (1990).
107. *See* Mark V. Tushnet, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 249 (1988).
108. Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989).

examples Tribe related was that of *Brown* itself, which he describes as simultaneously failure and success:

> By 1964, less than two percent of southern schools were desegregated. The direct force of the law had been almost a total failure. Yet *Brown v. Board of Education*'s mere declaration of rights profoundly affected the political dialogue in America. One reason was that this declaration of rights had itself dramatically altered the country's perspective as to which group had law and order on its side. During the Montgomery bus boycotts and throughout the civil rights movement, *Brown* put the force of legal morality behind the demonstrators. And, because most Americans believe in law and respect individual rights, the then unavoidable perception of a right-remedy gap fueled the political dialogue—with Martin Luther King using *Brown* to help propel the passage of major civil rights legislation.[109]

As law, *Brown* seems to have been a failure. But as rhetoric, it was a blinding success. By declaring segregated public education unconstitutional in *Brown*, the Court did not describe the world, it *re-made* it; it did not report justice, it performed it. As Tribe suggests, without *Brown*, most of the political and legislative action that has made a real difference in the lives of African-Americans and other minorities would not have taken place.

The enactment of RFRA was an extraordinary event. It represents perhaps the broadest political coalition ever assembled in support of any individual rights initiative and was passed by overwhelming margins in both houses of Congress.[110] In effect, the President of the United States, the Congress, and most interest groups have told the Court that its doctrine is seriously flawed. No formal constitutional apparatus can require the Court to listen to what the country told it by enacting RFRA, but having been sent, the message may be hard to ignore. Because of RFRA, the constitutional space in which the Court operates has been altered, and will remain altered, whether RFRA survives constitutional challenge or not. As a result, there may be reason to hope that the Supreme Court will yet fulfill its constitutional responsibility of protecting the religious liberty of all of America's people.

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109. *Id.* at 29 (footnotes omitted).

110. *See* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210-11 (1995).